No. 346.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ARCHIE SHELP and GEORGE CLEVELAND,
Plaintiffs in Error.

vs.

THE UNITED STATES OF AMERICA.
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

LORENZO S. B. SAWYER,
Counsel for Plaintiffs in Error.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

ARCHIE SHELP and GEORGE CLEVELAND, *Plaintiffs in Error.* vs. THE UNITED STATES OF AMERICA.	No. 346. 23 U. S. Stats. at Large Chap. 53, Sec. 14.

Statement of the Case

CHIEFLY IN THE WORDS OF THE RECORD.

At the adjourned November, 1894, term of the District Court for the District of Alaska the Grand Jurors for said district returned an indictment against the plaintiffs in error, defendants below, charging said defendants below, Archie Shelp and George Cleveland, with "the crime of unlawfully selling intoxicating liquors within said District, committed as follows: The said Archie Shelp and George Cleveland at or near Chilcoot, within the said District of Alaska, and within the jurisdiction of this Court, on or about the 18th day of August in the

year of our Lord one thousand eight hundred and ninety-four, did unlawfully and willfully sell to Alaska Indians, whose real names are to the Grand Jurors aforesaid unknown, an intoxicating liquor called whisky, to-wit, one pint, quart, gallon of said liquor, the real quantity is to the Grand Jurors unknown; without having first complied with the law concerning the sale of intoxicating liquors in the District of Alaska.

"And so the Grand Jurors * * * upon their oaths do say: That Archie Shelp and George Cleveland did then and there unlawfully sell intoxicating liquors to-wit, whisky, in the manner and form aforesaid, to the said Alaska Indians contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the United States of America." (Record, pp. 2, 3.)

"And afterwards, to-wit, on the 2nd day of December, 1895, the following further proceedings were had and appear of record in said cause which are words and figures following, to-wit:

UNITED STATES, vs. GEORGE CLEVELAND and ARCHIE SHELP.	No. 427.

Plea.

"Now at this day comes the plaintiff by Burton E. Bennett, Esq., United States Attorney, and the defendant, George Cleveland being personally present and his counsel, John F. Malony, Esq., waives arraignment and further time to plead, and enters a plea of 'not guilty' to the indictment." (Record, p. 4.)

On April 15th, 1896, the following further proceedings were had and appear of record in said cause, to-wit:

Trial.

"This cause coming on for trial, the plaintiff being represented by Burton E. Bennett, United States Attorney, and the defendants being personally in court, and their counsel, Messrs. J. F. Malony, Esq., and John Trumbull, Esq., the venire of the petit jury was called" * * and a jury of twelve men "sworn to try the issues," and the evidence was heard in part. (Record, p. 5.)

"On the next day, April 16, 1896, the plaintiff being represented by Burton E. Bennett, Esq., United States Attorney, the defendants being present and their counsel, Messrs. J. F. Malony, Esq., and John Trumbull, Esq., the jury rendered the following verdict:

The United States of America, }
District of Alaska. }

In the District Court of the United States for the District of Alaska.

UNITED STATES OF AMERICA, }
vs. }
ARCHIE SHELP and GEORGE CLEVELAND. }

Verdict.

Special session commencing March 30, 1896.

We, the jury empaneled and sworn in the above-entitled cause, find the defendant guilty as charged in the indictment.

J. D. DOUGLAS,
Foreman."

The jury was thereupon discharged from further attendance in this cause and the defendants required to furnish bail in the sum of five hundred dollars for appearance before the Court for sentence. (Record, pp. 5–7.)

"And on April 18, 1896, the following further proceedings were had and appear of record in said case, to-wit:

"UNITED STATES,
vs.
ARCHIE SHELP and GEORGE CLEVELAND. } No. 427.

Judgment.

"Now at this day comes the plaintiff by Burton E. Bennett, Esq., United States Attorney, as also come the defendants in person, with Messrs. J. F. Malony and John Trumbull, their counsel, and appearing for judgment, and the motion for new trial and the motion for arrest of judgment being denied—

"It is ordered, adjudged and decreed that defendants be, and they are hereby, convicted of the crime of unlawfully selling intoxicating liquors in Alaska and sentenced to imprisonment in the U. S. Jail for the District of Alaska for the term of six calendar months." (Record, pp. 20, 21.)

We have been thus full and precise in our recital of court proceedings for reasons that will soon appear.

Assignment of Errors.

"First: It was error for the Court to overrule the objections of the defendants to the witnesses Dennis, Goonawk, Dick, Samdoo, Casto and Jim, for the reason that the names of said witnesses were not endorsed upon the indictment, and for the reason that neither the defendants or their attorneys were furnished with a list containing the names of said witnesses, and for the further reason that no order of Court was made allowing the District Attorney to have other witnesses sworn on the part of the plaintiff than those endorsed on the indictment.

"Second: It was error for the Court after the plaintiff had rested its case to deny the defendants' motion for a non-suit or a peremptory instruction to the jury to bring in a verdict for the defendants, upon the ground that the plaintiff had failed to establish the material allegations of the indictment by evidence, in this, that the evidence failed to show that the defendants had sold whisky in Alaska without first complying with the law in regard to the sale of intoxicating liquors in Alaska.

"Third: The Court erred in overruling the defendants' motion in arrest of judgment, for the reason that said indictment does not charge facts sufficient to constitute a crime against the laws of the United States.

"Fourth: The Court erred in instructing the jury in the manner and under the circumstances as follows, to-wit:

"One of the defendants' counsel in addressing the jury, among other things, referring to the Indian witnesses who had testified on behalf of the plaintiff, and in discussing the weight to be given to evidence by the jury, stated in his argument as follows, to-wit:

" 'That the evidence of ignorant, half-civilized barbarians, whose moral and religious sense was not developed, and who did not understand and appreciate the binding force of an oath as understood by Christian peoples, and who had little or no appreciation of the enormity of perjury,—that the evidence of such witnesses was not entitled to as much credit as the evidence of a witness whose moral ideas were more fully developed, and who understood the binding nature of an oath, and the pains and penalties of perjury.'

" After the argument the Court, referring to the argument of counsel above set forth, among other things instructed the jury as follows:

" 'It is a fact that Indians lie, and it is also a fact that white men lie, and some of the most civilized and cultured men are among the greatest liars. The evidence of Indian witnesses is entitled to as much credit and weight as the evidence of white men, and such credibility and weight are determined by the same rules of law; in weighing the evidence of witnesses you have the right to consider their intelligence, their appearance upon the witness stand, their apparent candor and fairness, in giving their testimony, or their want of such candor or fairness, their interest, if any, in the result of this trial, their opportunities of seeing and knowing the matters concerning which they testify, the probable or improbable nature of the story they tell, and from these things together with all the facts and circumstances surrounding the case as disclosed by the testimony, determine where the truth of this matter lies. You have a right to use your own knowledge of this country, the habits and disposition of the Indians, and your knowledge and observation of the fact that whisky peddlers cruise about this coast going from one Indian

village to another, selling vile whisky to the natives. There is no evidence that these defendants located a claim or drove a stake, and it is for you to determine from the evidence whether they were out prospecting with pick and pan and shovel as honest miners, with a view of locating claims, or whether they were out with a keg of whisky and a tin cup prospecting for the aboriginal native.'

"Fifth: The Court erred in denying the defendants' motion to vacate the verdict and to grant a new trial, in this, to-wit:

1. Irregularity in the proceedings and abuse of discretion by the Court in this: At the conclusion of the cross-examination of the witness for the defense, William Raymond, the Court asked the witness if there was not an Indian village at Bartlett Bay and another at Hoona, to which the witness answered 'yes, sir,' whereupon the Court in presence of the jury exclaimed, 'A-h-h. That is all, sir.'

"2. Misconduct on the part of the United States Attorney in his argument to the jury by stating to the jury as follows: 'That the result of the acts with which the defendants were charged was that a murder had been committed and that the Indian who had committed the murder was in the penitentiary at San Quentin for such crime,' although no evidence whatever had been introduced of any murder having been committed. And further stated to the jury that 'The defendants went to the Indian village at Hoona and sold whisky there,' although the defendants were not charged in the said indictment with selling liquor at Hoona, and although there was no evidence that defendants had stopped at Hoona or sold liquor there.

"3. Surprise which ordinary prudence could not have guarded against.

"4. Newly discovered evidence, material for the defendants, which they could not with reasonable diligence have discovered and produced at the trial.

"5. Insufficiency of the evidence to justify the verdict, in this to-wit, that it appears from the evidence that the defendants were at Funter Bay on the 16th and 17th days of August, 1894, eighty or ninety miles from Chilkoot; that they left on the 17th on their sloop, and arrived at Bartlett Bay on the morning of the 18th; that Bartlett Bay is about forty miles from Funter Bay; that they stayed at Bartlett Bay until the morning of the 19th; that Bartlett Bay is 108 miles from Chilkoot; that the trip from there to Chilkoot could not be made in less than three days, and that it was a physical impossibility for the defendants to have been at Chilkoot at any time from the 16th to the 22nd of August. It further appearing from the evidence of the ex-Deputy Marshal, who went to Chilkoot two days after the alleged whisky selling took place, that the Indians arrived at Juneau on the 20th day of August, 1894, and made the complaint charging the defendants with selling liquor on the 18th day of August, and that the trip from Chilkoot to Juneau could not be made in less than two days.

"6. Error in law occurring at the trial and excepted to by the defendants."

Argument.

Before taking up and discussing seriatim the errors assigned herein, we wish to call the attention of the

Court to one plain, open, palpable and fatal error that appears upon the very face of the record.

The Court, can, in any case, and will, in a criminal case, notice a plain error not assigned. The Supreme Court often does this—did it in the Crain case *infra*—and so does this Court. A criminal proceeding is *strictissimi juris*. Everything against the accused is construed strictly, everything in his favor liberally. Where the error does not appear of record, of course, a bill of exceptions becomes necessary. This Court held in *Ry. Co.* vs. *Drake, et al* (72 Fed., 945), that a writ of error addresses itself to the record, and, therefore, when the record itself discloses the ground on which a reversal is sought there is no necessity for a bill of exceptions; and, again, that a statement on motion for a new trial, if regularly settled and allowed by the trial judge, may serve as a bill of exceptions on writ of error (Alexander vs. U. S. 57 Fed., 828). When the error appears of record, or, for that purpose, is incorporated in a bill of exceptions, it can be specified in a brief although not assigned.

The record in this case does not show that Archie Shelp, one of the defendants in the court below, was ever formally arraigned, or that he pleaded to the indictment, or that any plea was ever entered for him; unless all this is to be inferred simply from his presence at the trial, at the rendering of the verdict and at the pronouncing of the judgment and from the recital in the order of the trial that "the jurors were sworn to try the issues," and in the bill of exceptions that "the issue

joined in the above stated cause between the said parties came on to be tried before the said judge and a jury which was duly impaneled and sworn to try the issue between the said parties" (Record, pp. 4, 5, 6, 7, 20 and 21 and Statement of Case in brief). This the Supreme Court holds is not enough. The case of *Crain* vs. *The United States* (162 U. S., 625) involved the indictment and conviction of a more serious offense than these defendants are charged with, but the decision of the Court covers the whole ground. In the case at bar a plea is entered for *only one defendant and the verdict strictly follows and corroborates the plea of only one defendant.*

The decision begins:

"The transcript before the court must be taken to be as certified, namely, a true and complete copy of the record and proceedings in this case." It then disposes of several of the grounds of the motion in arrest of judgment made in the court below, and then takes up this objection—the absence in the record of any definite statement of arraignment or plea of the defendant; and after citing many authorities and cases of misdemeanors, as well as higher crimes, it holds that an arraignment, and especially a *plea* "is not a matter of *form* but of *substance*," and "consequently such a defect in the record of a criminal trial is not cured by section 1025 of the Revised Statutes (sometimes called the statute of amendments and jeofailes), but involves the substantial rights of the accused." "A plea to the indictment is necessary before the trial can be properly commenced, and unless this fact *appears affirmatively*

from the record, the judgment cannot be sustained. Until the accused pleads to the indictment, and thereby indicates the issue submitted by him for trial, there is nothing for the jury to try; and the fact that the defendant did so plead should not be left to be inferred. * * *" A little further on the court indignantly asks: "Are we at liberty to guess that a plea was made by or for the accused, and then guess again as to what was the nature of that plea?" * * * "Nor ought the courts, in their abhorence of crime, nor because of their anxiety to enforce the law against criminals, countenance the careless manner in which the records of cases involving the life or liberty of the accused are often prepared. Before a court of last resort affirms a judgment of conviction of, at least, an infamous crime, it should *appear affirmatively from the record* that every step necessary to the validity of the sentence has been taken. That cannot be predicated of the record now before us. We may have a belief that the accused, in the present case, did, in fact, plead not guilty of the charges against him in the indictment. But this belief is not founded upon any clear, distinct, affirmative statement of record, but upon inference merely. *That will not suffice.* * * * The present defendant may be guilty, and may deserve the full punishment imposed upon him by the sentence of the trial court, but it were better that he should escape altogether than that the court should sustain a judgment of conviction * * *where the record does not clearly show that there was a valid trial.* The judgment is reversed. * *"

Now as to our assignments of error. Passing over without waiving the first two, we come to the third:

"Third: The Court erred in overruling the defendants' motion in arrest of judgment, for the reason that said indictment does not charge facts sufficient to constitute a crime against the laws of the United States."

The ground of a motion in arrest of judgment, like any question that arises upon the pleadings, or upon the face of the record, is reviewable in an appellate court, like an objection to the jurisdiction of the court which may be taken at any time and is never waived.

Does this indictment charge facts sufficient to constitute a crime against the laws of the United States?

The statute under which this indictment was framed provides: "And the importation, manufacture and sale of intoxicating liquors in said district, except for medicinal, mechanical and scientific purposes, is hereby prohibited. * * * And the President of the United States shall make such regulations as are necessary to carry out the provisions of this section" (23 Stats. at Large, 28). The allegation in the indictment, stripped of considerable verbiage, is that the defendants sold to Alaska Indians an intoxicating liquor called whisky without having first complied with the law concerning the sale of intoxicating liquors in the district of Alaska.

It will be seen at a glance, from a comparison of the law with the indictment, that all the allegations of the indictment might be true, and yet the defendants be innocent of any crime against the laws of the United

States. Even if the defendants, or either of them, sold any intoxicating liquor, *non constat* that they did not sell it for medicinal, mechanical or scientific purposes. When the enacting clause of a statute describes the offense with certain exceptions, it is necessary to negative the exceptions, although if the exceptions are contained in separate clauses of the statute, they may be omitted in the indictment and the defendant must show that his case comes within them in order to avail himself of their benefit. Bish. Crim. Proc. § 635; Whart. Crim. Pl. §§ 240, 631.

We are aware that Judges Deady and Dawson sustained an indictment which did not negative these exceptions (U. S. vs. Nelson, 29 Fed. 202, 30, Fed. 112), but we think this court will prefer to follow the Supreme Court (U. S. vs. Cook 17 Wall. 173), in not departing from established forms. Via antiqua via est tuta. In the Crain case, supra, says the Supreme Court with reference to arraignment and plea, but it applies as well to this question, "Neither sound reason nor public policy justifies any departure from settled forms applicable in criminal prosecutions. * * Even if there were a wide divergence among the authorities upon this subject, safety lies in adhering to established modes of procedure devised for the security of life and liberty."

While upon the indictment, we call the attention of the court to the phrase, "Without having first complied with the law concerning the sale of intoxicating liquors in the district of Alaska."

Now the law supra absolutely prohibits such sale,

"except for medicinal, mechanical and scientific purposes." What, then, can be the meaning or relevancy of this phrase? It can only refer to the fact referred to in another case (U. S. vs. Ash 75, Fed. 651), that under the Internal Revenue laws, or under the regulations of the President by the Secretary of the Treasury, this great Government accepts from applicants in the district of Alaska an internal revenue tax and issues a license to sell intoxicating liquors contrary to law, and then indicts, arrests and punishes them for doing so. This clause may not invalidate the indictment, because, like the words, "Alaska Indians," it may be regarded as surplusage; but the "state of things" which it points at certainly reflects no credit upon our beneficent Government and its laws and the administration of justice in Alaska.

Our next error alleged is to a portion of the charge of the court given in the manner and under the circumstances following, to-wit:

"Fourth: * * One of the defendants' counsel in addressing the jury, among other things, referring to the Indian witnesses who had testified on behalf of the plaintiff, and in discussing the weight to be given to evidence by the jury, stated in his argument as follows, to-wit:

'That the evidence of ignorant, half-civilized barbarians, whose moral and religious sense was not developed, and who did not understand and appreciate the binding force of an oath as understood by Christian peoples, and who had little or no appreciation of the enormity of perjury,—that the evidence of such wit-

nesses was not entitled to as much credit as the evidence of a witness whose moral ideas were more fully developed, and who understood the binding nature of an oath, and the pains and penalties of perjury.'

After the argument the Court, referring to the argument of counsel above set forth, among other things instructed the jury as follows:

"'It is a fact that Indians lie, and it is also a fact that white men lie, and some of the most civilized and cultured men are among the greatest liars. The evidence of Indian witnesses is entitled to as much credit and weight as the evidence of white men, and such credibility and weight are determined by the same rules of law; in weighing the evidence of witnesses you have the right to consider their intelligence, their appearance upon the witness stand, their apparent candor and fairness, in giving their testimony, or their want of such candor or fairness, their interest, if any, in the result of this trial, their opportunities of seeing and knowing the matters concerning which they testify, the probable or improbable nature of the story they tell, and from these things together with all the facts and circumstances surrounding the case as disclosed by the testimony, determine where the truth of this matter lies. You have a right to use your own knowledge of this country, the habits and disposition of the Indians, and your knowledge and observation of the fact that whisky peddlers cruise about this coast going from one Indian village to another, selling vile whisky to the natives. There is no evidence that these defendants located a claim or drove a stake, and it is for you to determine from the evidence whether they were out prospecting with pick and pan and shovel as honest miners, with a

view of locating claims, or whether they were out with a keg of whisky and a tin cup prospecting for the aboriginal native." Lo! a wholesale denunciation of both the good & the bad in order to bolster up the bad!

In *Hicks* vs. *U. S.* (150 U. S., 442), the Supreme Court held that "The rule that exceptions should be precise and pointed, so as not to require the Court to search for errors through long passages, does not apply when it is necessary or useful to cite an entire passage in order to form a just view of the error complained of." Is not the unfairness of this instruction apparent? Civilization and even Christianity go for naught with this judge in his most-seeming righteous wrath. Falstaff, to cover up his own monstrous lies, exclaimed, "Lord, lord, how this world is given to lying!" But this able and learned judge, in cold blood and without any inducement, makes the same exclamatory declamation. David, in his sore affliction, made a similar complaint, but took it back and apologized for it in almost the same breath, "I *said in my haste*, all men are liars." How different from this instruction those which the Supreme Court in recent cases approves—how much more objectionable than some of those which it condemns.

In *Hicks* vs *U. S.* (150, U. S., 442), the accused having testified in his own behalf, the Court charged that there was or might be a "conflict as to the material facts between the statements of the accused and the statements of the other witnesses who are telling the truth." The Supreme Court held that this was objectionable in its assumption that the witnesses who contradicted de-

fendant were telling the truth. And "when the statute makes the accused, on his own request, a competent witness, its policy should not be defeated by hostile comments of the trial judge."

In *Starr* vs. *U. S.* (153 U. S., 626), the Supreme Court quote with approval the language of the Supreme Court of Pennsylvania in *Burke* vs. *Maxwell*, 81 Pa. St., 139: "When there is sufficient evidence upon a given point to go to a jury, it is the duty of the judge to submit it calmly and impartially. And if the expression of an opinion upon such evidence becomes a matter of duty under the circumstances of the particular case, great care should be exercised that such expression should be so given as not to mislead and especially that it should not be one-sided."

In this same Starr case says the Court:

"It is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling (referring to the Hicks case *supra*). The circumstances of this case apparently aroused the indignation of the learned judge in an uncommon degree and that indignation was expressed in terms which were not consistent with due regard to the right and duty of the jury to exercise an independant judgment in the circumstances, or with the circumspection and caution which should characterize judicial utterances."

In *Hickory* vs. *U. S.* (160 U. S., 408), the Court below

contrasted the testimony of the accused with circumstances to the prejudice of the former. The Supreme Court, after quoting the Starr and other cases, says:

"Such denunciation of the testimony of the accused is without legal warrant citing *Allison* vs. *U. S.* (160 U. S., 203). This instruction was if possible more markedly wrong from the implications which it conveyed to the jury. * * * In *Reynolds* vs. *U. S.* (98 U. S., 168), speaking through Mr. Chief Justice Waite, this Court said on the same subject, 'Every appeal by the Court to the passions or prejudices of the jury should be promptly rebuked and * * it is the imperative duty of the reviewing Court to take care that wrong is not done in this way'"

In the Allison case referred to says the Supreme Court: "Where the charge of the trial judge takes the form of animated argument, the liability" * * of error "is great."

In *Brown* vs. *U. S.* (17 S. C. Rep., 33, not yet officially reported), the Supreme Court reversed a judgment for the third time, after three juries (36 jurors) had agreed to find the defendant guilty, because the trial judge charged that 'twas not the judgment of bad people, the criminal element, the man of crime * * that made up reputation. * * To the same effect is *Smith* vs. *U. S.* (161 U. S., 85).

Against such a charge as that in this case of what avail would be even the armor of innocence? What becomes of those good old English maxims that the Court is always the chief counsel for the prisoner, and

that it is better that nine guilty men escape than that one innocent man be punished? Such is the wisdom and humanity of our laws that in the United States courts *only* the defendant has a right to a review in a criminal case.

Does not this whole charge illustrate how out of place in a Judge's charge is wit or even humor? Wit is often cruel, humor grim, and both unjust.

Our next assignment of error, our fifth assignment, is to the ruling of the court below upon a motion for a new trial setting forth the grounds of the motion.

It has been repeatedly held that a motion for a new trial or any other motion addressed solely to the discretion of the court below is not reviewable. The exception to this rule, and there are very few rules which are not proved, as they say, by exceptions, is that "where the questions presented (grounds of the motion) go directly to the merits of the case," the appellate court will review them. *U. S.* vs. *Hewecker* 17 S. C. Rep. 18 not yet officially reported). In *Ball* vs. *U. S*, (163 U. S. 662, 674,) and in other cases, the Supreme Court does consider the grounds of a motion for a new trial. This exception covers our case.

An appellate court will review matters of mere discretion where the discretion has been abused and even matters of fact where the facts are all on one side and the judgment complained of on the other. What are courts for, if not to do justice and to see justice done?

The grounds of the motion for a new trial, which we claim are reviewable in this court, are:

"1. Irregularity in the proceedings and abuse of dis-

cretion by the Court in this: At the conclusion of the cross-examination of the witness for the defense, William Raymond, the Court asked the witness if there was not an Indian village at Bartlett Bay and another at Hoona, to which the witness answered 'yes sir,' whereupon the Court in presence of the jury exclaimed, 'A-h-h. That is all, sir.'

"2. Misconduct on the part of the United States Attorney in his argument to the jury by stating to the jury as follows: 'That the result of the acts with which the defendants were charged was that a murder had been committed and that the Indian who had committed the murder was in the penitentiary at San Quentin for such crime,' although no evidence whatever had been introduced of any murder having been committed. And further stated to the jury that 'The defendants went to the Indian village at Hoona and sold whisky there,' although the defendants were not charged in the said indictment with selling liquor at Hoona, and although there was no evidence that defendants had stopped at Hoona or sold liquor there."

As we have said of other errors, the error here hardly needs pointing out. The Judge himself elicits from a witness a fact which he evidently thinks counts against the defendants that there was an Indian village at Bartlett Bay and another at Hoona, over which in the presence of the jury he gloats, implying that, in his opinion, the defendants sold liquor at both those places; although they were not charged with having done so, nor was there a *scintilla* of evidence to prove it.

Did not the Judge's (in the words of the Supreme

Court) "abhorrence of crime," and a desire to see *somebody* punished get the better of his sober judgment in this case?

It appears from the second ground of the motion that the United States Attorney as well as the Court traveled out of his way and out of the record to abuse these defendants.

In *Preston* vs. *Mut. Life Ins. Co.* of N. Y., (71 Fed. 467,) the court, and although it was a trial court, we submit that the rule announced applies to any court, says:

"It is a familiar rule that counsel must not in argument refer to matter not in evidence to the prejudice of the adverse party and the failure to observe this rule is just ground for a new trial. * * The duty of the court to see that a trial is fair and that all material questions are fairly presented, is imperative, and the duty to regulate the proper conduct of a trial may be discharged either with or without motion. A case of such palpable unfairness might be presented as to warrant the Court in interposing upon its own motion."

That this conduct of the United States Attorney was calculated to prejudice the jury against the defendants does not admit of doubt,—'tis too plain for argument. We cannot make it any plainer than the bare statement makes it. Besides, to get the judgment against us reversed, we do not have to show that anything *did* prejudice or mislead the jury—all that is required of us is to show that it *might have* done so.

The other grounds of this motion we pass over

rapidly. If the Court thinks they go to the merits of the case it will consider them.

It appears from the fifth ground and from a reference to the indictment and testimony, that it was a physical impossibility for the defendants to have committed the crime charged at the time and place charged and attempted to be proved.

If the jury did not give the defendants the benefit of any legal and reasonable doubt to which they were lawfully entitled, this Court will right this wrong. A high Court of justice never shows to such advantage as when it tempers justice with mercy, which it must do when it expounds our "wise and humane" criminal laws.

We respectfully submit that for the errors herein recited the judgment of the lower court as to both defendants should be reversed, and the said defendants ordered discharged.

Respectfully submitted,

LORENZO S. B. SAWYER,

Counsel for Plaintiffs in Error.